Supreme Court, U.S.
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In The

Supreme Court of the United States

PROVIDENCE HEALTH PLAN,
an Oregon non-profit corporation,

Cross-Petitioner,

v.

GARY McDOWELL and ROSELEA McDOWELL,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED ON REVIEW

Notwithstanding this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), if a healthcare services contractor lacks an adequate remedy at law to enforce the terms of a healthcare services contract, does the Employment Retirement Income Security Act of 1974 ("ERISA") provide an equitable remedy pursuant to 29 U.S.C. § 1132?

CORPORATE DISCLOSURE STATEMENT

Cross-Petitioner's sole member is Providence Plan Partners, an Oregon non-profit corporation, whose two members are Providence Health System-Oregon, an Oregon non-profit corporation ("PH-OR") and Providence Health System-Washington, a Washington non-profit corporation ("PH-WA"). Both PH-OR and PH-WA have as their sole member the Sisters of Providence-Mother Joseph Providence, a Washington non-profit corporation, which has as its members the Provincial Superior and members of the Provincial Council of the Sisters of Providence-Mother Joseph Providence.

There are no publicly held companies that own more than 10 percent of the stock of cross-petitioner, its members, or its members' members. Cross-petitioner is a non-profit corporation, and has no stock.

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CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI*

Cross-petitioner Providence Health Plan respectfully files this conditional cross-petition for writ of *certiorari*, to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Providence Health Plan v. McDowell*, 385 F.3d 1168 (9th Cir. 2004). App. A-1 – A-13.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in *Providence Health Plan v. McDowell* addressed the consolidated appeals of two unpublished decisions of the United States District Court for the District of Oregon in cases numbered 01-1704-JE ("*McDowell* I") App. E-1 – E-7 and 02-6110-TC ("*McDowell* II") App. F-1 – F-7. In its original opinion, filed on March 24, 2004, the Ninth Circuit reversed the district court's decision in *McDowell* I and remanded the case to the district court for further proceedings. The Ninth Circuit also affirmed the district court's decision in *McDowell* II. *Providence Health Plan v. McDowell*, 361 F.3d 1243 (9th Cir. 2004). The Ninth Circuit filed an amended opinion on October 1, 2004, which reached the same result as did its initial opinion. *Providence Health Plan v. McDowell*, 385 F.3d 1168 (9th Cir. 2004). App. A-1 – A-13. On the same date, the court also entered an order denying cross-respondents' petition for rehearing or hearing *en banc*. App. B-1; C-1 – C-5.

JURISDICTION

The Ninth Circuit filed its amended opinion and an order denying the petition for rehearing or hearing *en banc* on October 1, 2004. Cross-petitioner files this conditional cross-petition for writ of *certiorari* pursuant to Supreme Court Rule 12.5. The petition for writ of *certiorari* to which this cross-petition relates was docketed on December 30, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a)(3) states:

> "(a) Persons empowered to bring a civil action A civil action may be brought –
>
> > "(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan[.]"

29 U.S.C. § 1144 states in relevant part:

> "(a) Supersedure; effective date
>
> "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

STATEMENT OF THE CASE

These consolidated cases involve cross-petitioner's attempts to enforce its undisputable contractual right to reimbursement from a third-party settlement obtained by cross-respondents for health care costs incurred on their behalf. Cross-respondents have filed a petition for writ of *certiorari* asking this Court to review the Ninth Circuit's decision in *Providence Health Plan v. McDowell*, 385 F.3d 1168, which holds that ERISA does not completely preempt a health care contractor's state law breach of contract action to enforce a reimbursement provision of its health care services contract against the beneficiary. The Ninth Circuit's opinion is correct and does not warrant review by this Court. Cross-petitioner will file a timely opposition to the petition for writ of *certiorari*.

The Ninth Circuit's opinion addresses two district court opinions that were consolidated for purposes of appeal. The questions presented by the petition for writ of *certiorari* address only the issues raised in *McDowell* I: Does ERISA completely preempt a health care contractor's state court breach of contract claim against a beneficiary to enforce a contractual reimbursement provision of the health care services contract? *McDowell* II addresses a closely related and potentially equally significant question that is not raised by cross-respondents: When no adequate remedy is available at law, is a health care services contractor entitled to enforce the terms of a contract with a beneficiary in equity under 29 U.S.C. § 1132(a)(3)?

The Ninth Circuit correctly concluded that ERISA does not completely preempt cross-petitioner's state court action to enforce its contractual right to reimbursement from cross-respondents. The petition for writ of *certiorari* should be denied. Cross-petitioner files this conditional cross-petition for writ of *certiorari*, however, to ensure that, if the Court grants review in this case, the Court will have the full array of issues before it and will face no procedural barriers to its determination of the intent and correct application of ERISA in these circumstances.

I. Summary of Facts

In February 1990, cross-respondent Gary McDowell applied through his employer for health coverage with cross-petitioner's predecessor in interest by merger. App. G-2; A-2. On the same application, cross-respondent Roselea McDowell applied for coverage as Gary McDowell's spouse. App. G-2. Cross-respondents renewed their coverage each subsequent year. App. G-2. Cross-petitioner issued a health care services contract ("contract") to cross-respondent's employer, effective January 1, 2000, under which cross-respondents were provided health insurance coverage subject to all the terms of the contract. App. G-2; A-2 – A-3.

In February, 2000, cross-respondents were injured in an automobile accident. App. A-3. As a result, cross-petitioner paid a total of $32,429.18 for cross-respondents' care. App. A-3. Paragraph 11.2 of the contract required cross-respondents to repay those sums to cross-petitioner from any third-party recovery, less a proportionate share of reasonable attorney fees. App. G-3; A-3. Additionally, on May 25, 2000, cross-respondents signed and their counsel accepted a trust agreement, through which cross-respondents irrevocably

directed their counsel to comply with the contract's reimbursement provision. App. A-3; G-3.

In February, 2001, cross-respondents brought suit in Washington state court against the driver of the vehicle which struck them and the driver's employer. Cross-respondents settled the action for an amount which cross-petitioner believes to be approximately $500,000. App. G-3; A-3. Cross-respondents refused to honor their obligation under the contract and trust agreement to repay cross-petitioner from the proceeds of the third party settlement. App. A-3 – A-4; G-4.

To enforce cross-respondents' contractual reimbursement obligation, cross-petitioner filed *McDowell* I in Linn County, Oregon, Circuit Court on October 18, 2001, alleging that cross-respondents had breached their agreement in both the contract and the trust agreement to reimburse cross-petitioner from any third party recovery for benefits paid on cross-respondents' behalf. App. G-1 – G-6. Cross-respondents removed the case to the United States District Court for the District of Oregon, claiming that ERISA completely preempted cross-petitioner's state law breach of contract claim. Cross-respondents also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), alleging that the relief sought by cross-petitioner was unavailable under ERISA, and that cross-petitioner's complaint therefore failed to state a claim for relief. App. H-4. Cross-petitioner opposed the motion to dismiss and filed a motion to remand the case to state court. App. E-2.

The district court denied the motion to remand and granted the motion to dismiss on the grounds that cross-petitioner's state law breach of contract claim was preempted by ERISA. App. E-1 – E-7.

On April 12, 2002, cross-petitioner filed a second action, under ERISA, against cross-respondents in the United States District Court for the District of Oregon for specific performance of the reimbursement provision of the contract and the trust agreement (*McDowell* II). App. H-1 – H-7. Cross-petitioner alleged that the district court's decision in *McDowell* I left cross-petitioner with no adequate remedy at law to enforce its contract with cross-respondents. As a result, under the federal common law of equity, cross-petitioner was entitled to specific performance of those contracts as other "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). App. H-5 – H-6. Relying on this Court's decision in *Great-West*, the district court granted cross-respondents' motion to dismiss and denied cross-petitioner's motion for summary judgment as moot. App. F-1 – F-7. Cross-petitioner appealed both from the judgment in *McDowell* I and from the judgment in *McDowell* II. The Ninth Circuit subsequently granted cross-petitioner's motion to consolidate the two cases for purposes of appeal. App. A-2.

On appeal, a panel of the Ninth Circuit reversed the judgment in *McDowell* I. The panel concluded that ERISA does not preempt cross-petitioner's state law breach of contract claim. App. A-10. Because the state law claim was not preempted, there was no federal jurisdiction over the claim and removal was improper. App. A-10. The panel reversed and remanded *McDowell* I with instructions to remand the case to state court. The same panel affirmed the judgment in *McDowell* II. App. A-10.

Cross-respondents filed a petition for rehearing and suggestion for rehearing *en banc*. The panel unanimously rejected the petition. App. B-1. Six members of the Ninth

Circuit dissented from the denial of hearing *en banc*. App. C-1 – C-5.

II. Basis For Federal Jurisdiction

In *McDowell* I, cross-petitioner filed a breach of contract action in state court to enforce its contractual reimbursement rights. Cross-respondents removed the case to federal district court. As the Ninth Circuit concluded, the district court did not have subject matter jurisdiction over cross-petitioner's state law breach of contract claim because cross-petitioner's claim was not completely preempted by ERISA. This Court has jurisdiction to decide that jurisdictional question. 28 U.S.C. § 1254.

In *McDowell* II, the district court had jurisdiction pursuant to 29 U.S.C. § 1132(a)(3) over cross-petitioner's claim for appropriate equitable relief under ERISA. The district court determined otherwise, however, and held that the federal court had no equitable jurisdiction under ERISA over cross-petitioner's claim for specific performance. This Court has jurisdiction to decide that jurisdictional question as well. 28 U.S.C. § 1254.

The Ninth Circuit had jurisdiction over cross-petitioner's timely appeals from both judgments under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI*

The Ninth Circuit correctly decided that ERISA does not completely preempt cross-petitioner's state law breach

of contract action to enforce its contractual right to reimbursement from cross-respondents. The Ninth Circuit's decision is consistent with this Court's jurisprudence, including its decision in *Great-West*, Supreme Court Rule 10(c); and does not conflict with the decision of another federal circuit or state court of last resort. Supreme Court Rule 10(a). As cross-petitioner will more fully explain in its opposition, the petition for writ of *certiorari* should be denied.

If, however, the court allows the writ, then it also should grant cross-petitioner's conditional cross-petition for writ of *certiorari*. The questions presented for review by cross-respondents address only the issues raised in *McDowell* I: whether ERISA completely preempts a state court breach of contract action to enforce a beneficiary's contractual obligation to reimburse a health care contractor from a third party recovery for benefits incurred on the beneficiary's behalf. The Ninth Circuit decided that the correct answer is no. If this Court chooses to review that decision, it also should have before it the issues presented by *McDowell* II. Cross-petitioner files this conditional cross-petition in order to ensure that, if this Court takes up the issues presented by the Ninth Circuit's decision, it will have the complete case and the complete record before it and will be able to address fully and completely the legal questions raised by this consolidated appeal.

The Court's rules establish that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a). By considering together the related issues raised in both *McDowell* I and *McDowell* II, the Court will avoid any procedural barriers to its ability to fully address the question of whether and how a health care services contractor can

enforce a beneficiary's contractual promises. With the full panoply of issues before it, the Court may decide that the Ninth Circuit correctly decided both *McDowell* I and *McDowell* II or either or neither of those cases. Cross-petitioner believes that the petition for writ of *certiorari* should be denied. If, however, the Court allows the writ, it should allow cross-petitioner's conditional cross-petition as well. By doing so, the Court will ensure that it can fully resolve the remedy question that it left open in *Great-West*.

CONCLUSION

For the reasons discussed above, if the Court grants the petition for writ of *certiorari*, it should also grant the conditional cross-petition.

Respectfully submitted,

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